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CASES:

No. ———

Supreme Court of the United States

OCTOBER TERM, 1948

ROY R. RAINEY,
Petitioner,

VERSUS

A. R. CARTLIDGE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

The petitioner, Roy R. Rainey, respectfully shows:

A SUMMARY STATEMENT OF THE MATTER INVOLVED

There are no disputed questions of fact involved, and the appeal to the Circuit Court was upon an agreed statement pursuant to the terms of Rule 76 of the Federal Rules of Civil Procedure (Tr. 1).

Petitioner, a resident of Oklahoma City, Oklahoma, is the holder of a Federal Retail Liquor Dealer's Stamp.

He gave James Lee Hughes a written power of attorney to purchase in his name and stead a quantity of liquor from a wholesaler in Shreveport, Louisiana, which Hughes was to transport to petitioner in Oklahoma (Tr. 1).

While the liquor was being transported from Shreveport to Oklahoma City through the State of Texas, it and and the automobile in which it was being transported were seized without a warrant by the latter State's officers (Tr. 2).

Petitioner filed this action in the United States District Court for the Eastern District of Texas, for a mandatory injunction restraining respondents, the State officers, from damaging, removing or disposing of the seized liquor and automobile, and to compel restoration to petitioner (Tr. 3). The trial judge rendered judgment in favor of petitioner, which the Circuit Court reversed, ordering the injunction dissolved (Tr. 14, 168 Fed. [2d] 841).

The problem involved is whether the Texas Liquor Control Act (Vernon's Penal Code, Chapter 8, Article 666) is inapplicable to through shipments of liquor, as distinguished from imports, exports and intrastate movements, in accordance with the construction by the trial judge; and if the Circuit Court's construction that the Act is applicable to such shipments renders the statute unconstitutional as violative of the Commerce Clause (Article 1, Section 8, Clause 3) and the Equal Protection Clause (Fourteenth Amendment) of the Federal Constitution.

Subsequent to the filing of the instant action and the issuance of the temporary restraining order, a suit was

instituted in the State District Court by the Texas Liquor Control Board against the liquor and the automobile, seeking a judgment of forfeiture (Tr. 7), and this poses the additional point of the jurisdiction of the Federal Court.

The Texas Liquor Control Act follows the usual general pattern of state statutory codes regulating the liquor business. It provides for the creation of a board to administer it, and requires individuals desiring to engage in the business to secure the type of permit prescribed for the particular phase of the business in which the individual desires to engage. The permits cover all features of the industry from distillery to sale by the retailer to the ultimate consumer.

Among the enforcement provisions and penalties for violation of the Act, there are incorporated forfeiture provisions of liquor and equipment involved in illicit traffic (Article 666-30). A special provision is made for forfeiture of liquor and vehicle, if illegally transported (Article 666-44).

THIS COURT HAS JURISDICTION

The judgment of the Circuit Court was entered on June 30, 1948, and the order denying petition for rehearing was entered on August 7, 1948.

Jurisdiction of this Court is invoked under the Judicial Code as embodied in 28 USCA 1254 and 347. The grounds upon which review by *certiorari* is sought are those mentioned in Rule 38 of this Court, that the Court of Appeals has decided important questions of local and

Federal law in a way probably in conflict with applicable local and United States Supreme Court decisions, as shown hereinafter under "Reasons Relied on for Allowance of Writ."

QUESTIONS PRESENTED

I.

Does the Texas Liquor Control Act (Article 666, Vernon's Texas Penal Code) apply to through shipments of liquor which do not come to rest within the State, so as to require a permit to transport such shipments; the title and body of the Act making no provision as to liquor transported from one State to another through Texas, except that Subdivision (11) of Section 15 of Article 666, entitled "Carrier Permit," provides: "The restrictions contained in this Section shall not apply when in the course of an interstate or foreign shipment of liquor it is necessary to cross the State in the course of such transportation"?

II.

Did the Court of Appeals err in holding that the Texas statutory requirement that, as a prerequisite to the transportation of liquor, a permit be secured from the Liquor Control Board by those transporting "liquor into and out of this State and between points within this State" applied to shipments moving through the State?

III.

If the Texas Liquor Control Act does require a permit to be procured as a prerequisite to the allowance of a person to transport liquor through the State, is it

not violative of the Commerce and Equal Protection Clauses of the Federal Constitution, since a permit cannot be obtained by a private individual, but only by certificated motor carriers? And has it not erred in construing that such a state regulation is upheld by this Court's decision in *Ziffrin* v. *Reeves*, 308 U. S. 132, 60 Sup. Ct. 163, 84 L. Ed. 128, which held that, the states having plenary power over manufacture, sale and importations of liquor, including absolute prohibition, a state could prevent transportation of liquor from the distillery manufacturing it to points outside the state, except by common carriers? That decision and the Twenty-first Amendment are inapplicable to the case at bar as the subject liquor was neither manufactured or sold within nor imported into or exported from Texas.

IV.

Is not a regulation prohibiting transportation through a state except by a common carrier holding a certificate of convenience and necessity, a substantial and direct burden upon interstate commerce, rendering it void under the Commerce Clause and equal protection of the law provisions of the Fourteenth Amendment to the Federal Constitution?

V.

The Federal Court having jurisdiction by virtue of diversity of citizenship and the involvement of Federal questions, does it not have the right to proceed to a conclusions of the case on the merits, since this action was filed and restraining order entered prior to the institution of the State Court action?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

The Circuit Court has decided an important question of local law probably in conflict with local decisions and statutes.

Regulation of liquor traffic in Texas is embodied in a comprehensive act, the Texas Liquor Control Act,[1] the purpose of which is stated in the title to be regulation of "the traffic of alcoholic liquors in this State." The general prohibitory provisions of the Act, contained in 666-4(a), are:

> "It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this State, export from the State, transport, * * * liquor *in* any wet area without first having procured a permit of the class required for such purpose" (Emphasis ours).

Then follows 666-4(b), applying to dry areas, which is identical with 4(a) in language except that the last quoted words providing for a permit are eliminated, thus entirely prohibiting all manufacture, transportation, *etc.*, of liquor in any dry areas.

Manifestly, neither of these sections applies to transportation of through shipments, otherwise liquor could not be transported at all between wet areas in Texas which had to pass through dry areas. But in 666-23a(3) such transportation is expressly authorized.

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[1] Vernon's Penal Code, Chapter 8, Article 666.

The provisions governing carrier permits are found in 666-15(11), reading:

> "Carrier Permit. The word carrier when used in this Section shall mean and include water carriers, airplane lines, all steam, electric, and motor power railway carriers, and common carrier motor carriers operating under a certificate of convenience and necessity issued by the Railroad Commission of Texas or such certificates issued by the Interstate Commerce Commission. The holder of such certificates shall be authorized to transport liquor *into and out of this State and between points within this State.* Such carriers shall furnish such information concerning the transportation of liquor as may be required by the Board. *The restrictions contained in this Section shall not apply when in the course of an interstate or foreign shipment of liquor it is necessary to cross the State in the course of such transportation*" (Emphasis supplied).

It will be noticed that permits are not provided for as to carriers transporting through shipments, but only shipments into, out of, or between two or more points within Texas. The last sentence is a clear manifestation of non-intention to regulate through liquor movements not coming to rest within the State.

The Circuit Court erred in holding this Act applied to transportation of liquor through the State of Texas, and misconstrued the local decision of *Fogle* v. *State*, 133 Tex. Cr. R. 312, 111 S. W. (2d) 246, upon which its decision heavily rests. Such case involved only an intrastate shipment, and as to such the Court merely held the carrier was required to have both a permit to transport and a writ-

ten statement signed by the shipper showing ownership and destination, as provided in Article 666-27. It did not hold that a carrier of a through shipment had to have either of them, as such question was not involved.

No mention is made in the title of regulation of interstate shipments, which would be necessary under the Texas Constitution, Article 3, Section 35; *Gulf Insurance Company* v. *James,* 143 Tex. 424, 185 S. W. (2d) 966.

There is no basis in the Texas statutes or decisions for the Circuit Court's statement that: "The effect of the Texas Liquor Control Act is to confine the business of transporting intoxicating liquors through the State to those who are licensed as common carriers."

Furthermore, if this were so, the Act would be void as violative of the equal protection of the law guarantee in the Fourteenth Amendment and the Commerce Clause, since the Act provides for private carriers of liquor only in intrastate commerce, but more especially private carrier's permits can be procured under the Act only by persons holding also a brewers, distillers, wineries, rectifiers, wholesalers, Class B Wholesalers, and Wine Bottlers permit (Article 666-15[12]), and such permits can be secured only by Texas citizens (Article 666-18).

No provision is made for a permit being secured by a contract carrier to transport liquor, even though licensed by the Interstate Commerce Commission. This is unreasonable discrimination against private and contract carriers, contrary to the Fourteenth Amendment to the Federal Constitution.

II.

The Circuit Court decided a question of Federal Law in a way probably in conflict with the applicable decisions of this Court, when it held that the Texas Liquor Control Act limited the transportation of intoxicating liquor through the State to "licensed common carriers," and that "the regulation is reasonable, and appropriate to the end in view, and we are not authorized to hold it invalid."

As authority for this statement, the Circuit Court said: "In the case of *Ziffrin* v. *Reeves*, 308 U. S. 132, 60 Sup. Ct. 163, 84 L. Ed. 128, the Court upheld the provisions of the Kentucky Alcoholic Beverage Act, which forbade the transportation of intoxicating liquor by carriers other than licensed motor carriers." But the Court overlooked the fact that the shipment in that case was one of export of liquor manufactured in Kentucky, from the distillery located therein, and that regulation of through shipments was not involved in the case. This Court upheld the regulation because Kentucky has unlimited power over liquor manufactured within the state, including the mode of its transportation from the distillery, which does not apply to through shipments.[2]

2"It is our view that the **Ziffrin** case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted." **Duckworth v. State** (Ark.), 148 S. W. (2d) 656.

The case at bar is indistinguishable in principle from *Johnson* v. *Yellow Transit Company*, 321 U. S. 383, 64 Sup. Ct. 622, 88 L. Ed. 814, wherein this Court held that a state statute regulating transportation of liquor "into" the state did not purport to "regulate interstate shipments through the state to anoher state," and seizure of such a shipment by state officers was a wrongful interference with interstate commerce.

The Commerce Clause does not preclude states from imposing regulations reasonably designed to prevent diversion of intoxicating liquor into illegal channels within the state, so long as such regulations are not a substantial hindrance to or burden upon interstate commerce. A regulation limiting the transportation of liquor that is merely passing through the state, to licensed common carriers, is a direct, substantial and crippling burden upon through interstate shipments, transcending the leeway of permissive state regulation.

Cases of this character, coming to this Court in recent years wherein state regulations of liquor shipments in interstate commerce were upheld, involved state statutes approaching the very verge of invalidity under the Commerce Clause, but none of them has gone as far as the Circuit Court's decision. None has held that a state may require an individual to have made proof of public convenience and necessity to the Interstate Commerce Commission as a prerequisite to transporting a liquor shipment through the state. If only a common carrier (and not a contract carrier or a private carrier) may transport liquor, as the Circuit Court held the State Act validly requires, this

is in effect saying the state may burden interstate commerce by requiring all persons to secure certificates of convenience and necessity from the Interstate Commerce Commission. Furthermore, it is unreasonable discrimination against contract and private carriers.

III.

The Circuit Court, in holding that the Federal Court had no jurisdiction to enforce the Commerce Clause and protect this through shipment from illegal interference by state officers, and to issue a mandatory injunction compelling restoration to the owner, decided a Federal question probably in conflict with previous decisions of this Court.

The subject liquor shipment was seized on May 4, 1948, and this action instituted and a temporary restraining order entered on May 6, 1948, having for its objective the preservation and return of the liquor and automobile in which it was transported, to the owner and the channels of interstate commerce. Jurisdiction was in the Court, both by virtue of diversity of citizenship and the presence of a Federal question. The subsequent institution on May 8, 1948, of an action in the State Court by the Texas Liquor Control Board to forfeit the shipment and motor vehicle could not operate to interfere with the prior jurisdiction of the Federal Court.[3]

The procedure followed in this instance is the same as that pursued in the case of *Johnson* v. *Yellow Transit Company*, wherein this Court rejected a similar contention by the Oklahoma State authorities.

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[3]**Pennsylvania General Casualty Company v. Pennsylvania, 294 U. S. 189, 55 Sup. Ct. 386, 79 L. Ed. 850; General Baking Company v. Harr, 300 U. S. 433, 57 Sup. Ct. 540, 81 L. Ed. 370.**

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 12373, *A. R. Cartlidge et al., Appellants,* v. *Roy R. Rainey, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

MIKE ANGLIN,
OSCAR B. JONES,
DUKE DUVALL,
Counsel for Petitioner.

October, 1948.

No. ——

Supreme Court of the United States
OCTOBER TERM, 1948.

ROY R. RAINEY,
Petitioner,

VERSUS

A. R. CARTLIDGE ET AL.,
Appellees.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court appears at page 14 of the transcript, and is reported in 168 Fed. (2d) 841. The District Court filed no opinion, but its judgment appears in the transcript at page 9.

JURISDICTION

Petitioner seeks a review by *certiorari* of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered June 30, 1948, and order denying petition for rehearing, entered August 7, 1948, under the provisions of the Judicial Code, Title 28, United States Code, Sections 1254 and 347.

STATEMENT OF THE CASE

The facts are so short and simple and the case being appealed upon an agreed statement, there is no necessity for any statement of facts other than the one contained in The Summary Statement of the Matter Involved in the preceding Petition for Certiorari which is made a part hereof by reference.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the Texas Liquor Control Act applied to through interstate shipments of liquor passing across the State of Texas, and not coming to rest therein.

(2) The Circuit Court of Appeals erred in holding that, construing the Texas Liquor Control Act as limiting the transportation of through interstate shipments across the State of Texas to common carriers, the Act is a valid and reasonable regulation of interstate commerce, and is not in violation of the Commerce Clause, Article 1, Section 8(3), and the Equal Protection Clause of the Fourteenth Amendment, of the Federal Constitution.

(3) The Circuit Court of Appeals erred in holding that, although this action was filed in the Federal Court and a temporary restraining order issued prior to the filing of the forfeiture action in the State Court, the Federal Court was deprived of jurisdiction by the institution of the State Court case.

SUMMARY OF THE ARGUMENT

Point I.

The provisions of the Texas Liquor Control Act prohibiting transportation of liquor into, out of, and between points within the State except by licensed common carriers, does not apply to interstate shipments moving through the State, and to construe the Act otherwise would render it violative of the Commerce and Equal Protection Clauses of the Federal Constitution.

Point II.

The jurisdiction, power and right of the Federal Court in this case were not affected by the institution of the forfeiture action in the State Court subsequent to the issuance of the temporary restraining order by the Federal Court.

ARGUMENT

Point I.

The provisions of the Texas Liquor Control Act prohibiting transportation of liquor into, out of, and between points within the state except by licensed common carriers, does not apply to interstate shipments moving through the state, and to construe the Act otherwise would render it violative of the Commerce and Equal Protection Clauses of the Federal Constitution.

There is no provision of the Texas Act purporting to regulate "through shipments of liquor" or "shipments moving through or across the State" or the equivalent thereof. Indeed, the only time that such words or their equivalent are used in the Act is where the Legislature took pains to make it absolutely certain that carrier permits were not

required to transport through shipments, found in the last sentence of Article 666-15(11), which section provides for carrier permits, the language being: "The restrictions contained in this section shall not apply when in the course of an interstate or foreign shipment of liquor it is necessary to cross the state in the course of such transportation."

The language of this Act is different from that of Virginia, construed by this Court in *Carter* v. *Virginia*, 321 U. S. 383, 64 Sup. Ct. 464, 88 L. Ed. 605, which required a permit to be secured by all persons transporting "any alcoholic beverage within, into and through the State of Virginia."

The language of the pertinent provisions of the Act[1] relating to transportation and carriers' permits using the words "in" and "into", under numerous authorities does not apply to shipments moving across or through the State.

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[1]Article 666-4(a) provides:

"It shall be unlawful for any person to manufacture, distill, brew, sell, possess for the purpose of sale, import into this State, export from the State, transport, distribute, warehouse, store, solicit, or take orders for, or for the purpose of sale to bottle, rectify, blend, treat, fortify, mix, or process any liquor in any wet area without first having procured a permit of the class required for such purposes" (Emphasis ours).

Article 666-15(11) provides:

"Carrier Permit. The word carrier when used in this Section shall mean and include water carriers, airplane lines, all steam, electric, and motor power railway carriers, and common carrier motor carriers operating under a certificate of convenience and necessity issued by the Railway Commission of Texas or such certificates issued by the Interstate Commerce Commission. The holder of such certificates shall be authorized to transport liquor **into and out of this State** and **between points within this State.** Such carriers shall furnish such information concerning the transportation of liquor as may be required by the Board. The restrictions contained in this Section shall not apply when in the course of an interstate or foreign shipment of liquor it is necessary to cross the State in the course of such transportation" (Emphasis ours) .

In *Johnson* v. *Yellow Transit Company*, 321 U. S. 383, 64 Sup. Ct. 622, 88 L. Ed. 814, in construing the Oklahoma statute prohibiting the transportation of liquor into Oklahoma, and which is similar to the Texas Act in this respect, the Court said: "No Oklahoma law purports on its face to prohibit or regulate shipments of liquor into and through the State to another state * * * ."

In *Carter* v. *Virginia, supra*, in the body of the opinion this Court said: "It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the amendment."

In *United States* v. *Gudger*, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, the Court in construing the word "into" as used in the Federal Liquor Statute prohibiting the transportation of intoxicating liquor "into any state," said that such word "does not include the movement through a dry state as a mere incident to the transportation to another state, whether such transportation be by private carriage or by motor carrier."

In construing the California Liquor Control Statute, in *Collins* v. *Yosemite Park & Curry Company*, 304 U. S. 518, 58 Sup. Ct. 1009, 82 L. Ed. 1502, the Court likewise held that the Act pertaining to shipments in or into the State did not apply to through shipments.

Similar decisions of State Courts are no different in this construction. In *Com.* v. *1 Dodge Motor Truck*, 191 Atl. 590, 110 A. L. R. 919 (cited with approval by this Court in *Ziffrin* v. *Reeves*, 308 U. S. 132, 138, 60 Sup. Ct. 163, 84 L. Ed. 128, 135) the Pennsylvania Supreme Court

held that their Liquor Control Act prohibiting transportation of liquor "in" the State would not apply to an individual transporting a shipment through the State without stopping.

Other examples are found in *Ryman* v. *Legg*, 176 S. E. 403, 405; *State* v. *Williams* (N. Car.), 61 S. E. 61, 68; and *Humble Pipe Line Company* v. *State* (New Mex.), 109 Pac. (2d) 247, wherein the Court said: "The word 'in' referring to transportation of property wholly within the state; 'into' referring to transportation of property from another state into the state as its final destination."

We come next to the constitutional effect of the Circuit Court's construction of the Act to the contrary, and the correctness of its holding that only licensed common carriers can transport through liquor shipments across the State of Texas, but that "the regulation is reasonable, and appropriate to the end in view, and we are not authorized to hold it invalid." It is our position that such a regulation upon through interstate shipments violates the Commerce Clause and the equal protection guarantee of the Fourteenth Amendment.

It is well to note that motor vehicle common carriers in interstate commerce of liquor and other manufactured products are required by Part II of the Commerce Act, 49 USCA, Sections 306-307, to secure from the Interstate Commerce Commission, as a prerequisite to operation, a certificate of authority, and to procure such certificate it is necessary to prove or establish that the public convenience and necessity require such operation. So the effect of such a regulation as the one under consideration would

be that the State require any individual, in order to transport liquor in interstate commerce through the State of Texas, to possess or procure such a certificate.

Licensed contract carriers in interstate commerce, holding certificates from the Interstate Commerce Commission under 49 USCA, Sections 203(a)(15) and 309, would be prohibited entirely from the transportation of such shipments. Also, private carriers, as defined in 49 USCA, Section 203(a)(17), would be precluded from such transportation.

Does such a regulation violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution as being a substantial or hindering burden upon interstate commerce?

It is important to take notice at the outset that the problem here does not encompass the increased power of states to interfere with interstate shipments of liquor, as distinguished from other commodities, as conferred by the Twenty-first Amendment. The application of the Commerce Clause then in this case shall have its full force, to the same extent as if this were not a liquor shipment, but some other commodity.

As stated in the Annotation on the Twenty-first Amendment in 88 L. Ed. 614, at 616: "However, it seems that such amendment does not affect the operation of the commerce clause with respect to transportation of intoxicating liquor through a state, for the amendment merely prohibits the transportation or importation into a state 'for delivery or use therein' in violation of the laws of such state."

Citing, among others, the cases of *Duckworth* v. *Arkansas*, and *Carter* v. *Virginia, supra*. It is then pointed out by the Annotator that there is neither need nor propriety for consideration of the Twenty-first Amendment in passing upon the validity of a state regulation of "interstate transportation of intoxicating liquor which merely passes through the state imposing the regulation."

The subject Texas regulation is not comparable to the statutory regulation of such shipments by the State of Arkansas, which was upheld by this Court in *Duckworth* v. *Arkansas*, 314 U. S. 390, 62 Sup. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144, because there any individual could secure a permit merely for the asking.[2]

Nor does the case of *Ziffrin* v. *Reeves, supra*, support the decision of the Circuit Court, because the validity of the Kentucky statute involved there was upheld on an entirely different basis. That statute prohibited transportation of liquor manufactured in Kentucky, from the Kentucky distillery by anyone other than a licensed common carrier, but the State, having power to completely prohibit the manufacture, sale or export of liquor from the State, could impose any lesser regulations it desired. Such a situation is entirely different from that pertaining to through interstate shipments, as was pointed out by the Supreme Court of Arkansas in *Duckworth* v. *State*, 148 S. W. (2d) 659.

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[2]The Court said: "The present requirement of a permit is not shown to be more than a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and affords opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion in conformity to the permit."

The regulation on carriers of through shipments imposed by the Texas statute under the construction of the Circuit Court is bound to be invalid as imposing an unreasonable burden upon and interference with interstate commerce, under the holdings of this Court. *Freeman* v. *Hewit*, 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265, wherein the Court held that not even an internal regulation by a state will be allowed if it directly affects interstate commerce, and that the power of the Commerce Clause of the Constitution was a sufficient limitation in itself against such burdens without implementing legislation by Congress; and this notwithstanding that local commerce is subjected to a similar encumbrance. See, also, *United States* v. *Gudger, supra*, applying to liquor shipments.

As construed by the Circuit Court, the Texas Liquor Control Act violates the equal protection of the laws guaranteed by the Fourteenth Amendment, by its injustifiable discrimination against private and contract carriers. No provision is made in the Act at all for a contract carrier to secure a permit, and the only individuals who are authorized to receive a private carrier's permit are those who hold some other type of permit which may be granted only to a citizen of the State of Texas, as provided in Article 666-15(12):

> "(12). Private Carrier Permit. Brewers, distillers, wineries, rectifiers, wholesalers, Class B Wholesalers, and Wine Bottler's, permittees shall be entitled to transport liquor from the place of sale or distribution to the purchaser, upon vehicles owned in good faith by such permittees when such transportation is for a lawful purpose; * * * Motor vehicles used for such

transportation shall be fully described in the application for a private carrier permit and such application shall contain all information which shall be required by the Board."

The type of permittees (those holding brewers, distillers, *etc.*, permits) eligible to secure a private carrier's permit under the Act, must be citizens of Texas under the provisions of Article 666-18, that:

> "No person who has not been a citizen of Texas for a period of three (3) years immediately preceding the filing of his application therefor shall be eligible to receive a permit under this Act."

If the individual is a corporation, fifty-one per cent of the stock must be owned by three-year, or more, citizens of the State.

The fact that the liquor shipment is enroute to a destination where the manufacture and sale of such liquor is prohibited by state law does not affect the situation one way or the other, under facts of the type involved in the case at bar. *Johnson* v. *Yellow Transit Company,* 138 Fed. (2d) 274, concurring opinion of JUDGE BRATTEN; *McCanless* v. *Graham* (Tenn.), 146 S. W. (2d) 137; *Barnett* v. *State* (Ala.), 9 So. (2d) 267.

Point II.

The jurisdiction, power and right of the Federal Court in this case were not affected by the institution of the forfeiture action in the State Court subsequent to the issuance of the temporary restraining order by the Federal Court.

The liquor and the automobile in which it was being transported were seized on May 4, 1948; this action in the Federal Court was commenced and temporary restraining order issued on May 6, 1948; and the forfeiture proceeding begun in the State Court on May 8, 1948 (Tr. 3, 4, 7).

At the hearing on May 14, 1948, upon the temporary injunction, the Trial Judge refused to dismiss or abate this action on account of the defendants having filed a subsequent suit in the State Court.

There is no question of the original jurisdiction of the trial court at the time of the institution of the action, by virtue of diversity of citizenship and the requisite amount, as well as being an action arising under the Constitution of the United States, Article I, Section 8(3), and thus involving a Federal question (Tr. 3-4).

Although this is not strictly an action *in rem*, necessarily the trial court's judgment would involve the disposition of the *res* in two ways: (1) by maintaining its *status quo;* and (2) the ultimate restoration of the property to the plaintiff. The right of the Federal Court to proceed, without interference by subsequently instituted State Court actions, would seem to be beyond debate. 21 C. J. S., "Courts", Sec. 529, P. 813, N. 16; *General Baking*

Company v. *Harr*, 300 U. S. 433, 57 S. Ct. 540, 81 L. Ed. 730; *Pennsylvania General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, 55 Sup. Ct. 386, 79 L. Ed. 850.

The procedure followed in the case at bar is identical with that pursued in the case of *Johnson* v. *Yellow Transit Company, supra*, wherein an injunction was sought against State officers who had seized an interstate shipment moving through Oklahoma allegedly in violation of the Oklahoma liquor statutes. The decision of the trial court granting a temporary restraining order and later a mandatory injunction compelling restoration by the officers of the liquor to the person from whom they had seized it, was upheld by this Court, and the contention of the State that the Federal Court should have relegated the plaintiff to relief in the State courts was rejected.

CONCLUSION

The important question of the erroneous construction of the Texas Liquor Control Act, as applying to through interstate shipments, by the Circuit Court justifies this Court assuming jurisdiction. But it is equally important that this Court set at rest the problem of the extreme to which state regulations of through interstate liquor (not subject to the Twenty-first Amendment) may not go without transgressing the Commerce Clause. Although the decision of *Johnson* v. *Yellow Transit Company, supra*, we think, is indistinguishable in principle from the case at bar, and is sufficient basis for reversal of the Circuit Court,

it did not have involved a shipment physically moving through a state, as here, but one moving to a Federal enclave in the state whose liquor regulations were involved.

Respectfully submitted,

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Counsel for Petitioner.

October, 1948.